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No. 594

In the

Supreme Court of the United States

OCTOBER TERM, 1956

C. A. DANIEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEIL BRANS,
Counsel for Petitioner.

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner C. A. Daniel respectfully petitions this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Fifth Circuit, rendered in this cause on the 28th day of May, 1956:

I. Opinions Below

The Judgment of the District Court below (R. 13) has not been published in the Federal Supplement. The opinion

of the Court of Appeals for the Fifth Circuit is reported in 234 Fed. 2d 102. The petition for Rehearing was denied August 27, 1956, without opinion, but with Cameron, Circuit Judge, dissenting.

II. Jurisdiction

This cause of action was instituted by the United States of America against the petitioner to recover $2,000 for each of three separate violations of the Surplus Property Act of 1944, Act of October 3, 1944, Chapter 479, 58 Stat. 765, as amended, repealed and re-enacted as the Act of June 30, 1949, Chapter 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. 489, and jurisdiction was vested in the United States District Court below by Section 26(c) of the Surplus Property Act of 1944, as amended [now 40 U. S. C. 489(c)].

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 25th day of May, 1956.

The Court of Appeals entered its order denying the petitioner's petition for rehearing on the 27th day of August, 1956, without opinion, but with dissent of Cameron, Circuit Judge.

The statutory provision believed to sustain jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

III. The Question Presented for Review

(a) Whether the Petitioner was deprived of his property or property rights as a result of the decision and judgment

of the Courts below without due process of law where the only evidence produced by the Government to connect the petitioner with the alleged conspiracy and fraud was hearsay and circumstantial and/or by the Court's assuming that the only competent evidence introduced in the case was false.

(b) Whether the failure to take the stand in his own behalf after the Government had failed to make out a prima facie case would warrant the inference that if his testimony had been produced, it would have been adverse to his interests.

(c) Whether the Government is required to prove the alleged conspiracy and fraud between the petitioner and the veterans involved to file any false applications for priority certificates beyond a reasonable doubt or is it only required to adduce substantial evidence of envolvement in any conspiracy or the inducement of misrepresentation as a fraudulent trick, scheme or device to enable petitioner to procure surplus property on a priority basis to which he was not then entitled under the Surplus Property Act.

IV. The Constitutional Provision Which the Case Involves

Fifth Amendment to the Constitution of the United States, 1787:

"Article (V). No person shall be * * * deprived of * * * property, without due process of law; * * *."

V. Statement of the Case Including the Facts Material to the Consideration of the Questions Presented

The Government brought this action to recover from the petitioner, C. A. Daniel, $2,000 for each of three separate violations of the Surplus Property Act of 1944, as amended, repealed and re-enacted as the Act of June 30, 1949, Chapter 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. 489. (R. 1.)

The Government alleged in its complaint that the petitioner, C. A. Daniel, used, or engaged in, or caused to be used, or engaged in, or entered into an agreement, combination, or conspiracy to use or engage in a fraudulent trick, scheme or device for the purpose of securing or obtaining surplus property consisting of three GMC 1942 model trucks from the United States to which he was not entitled by entering into arrangement with veterans, William B. Adair, Albert R. Axe and George L. Reese, whereby such veterans obtained veteran's priority certificates for the purchase of said trucks upon their statements and representations that such trucks would be used by them personally and not resold while in truth and in fact such trucks were obtained for the actual benefit and use of the petitioner and title to said trucks was later transferred from said veterans to the petitioner at a later date (R. 1).

The Government alleged that upon their representations, the three veterans received veterans preference certificates and on various dates thereafter purchased the three trucks involved herein (R. 4, 5 & 6). It was alleged that

veteran Adair purchased his truck on May 8, 1956, with his personal check (R. 4); that veteran Axe purchased his truck on March 28, 1946, with three cashier's checks (R. 5); that the petitioner paid to Axe his personal check in an equal sum on May 9, 1946 (R. 5); that veteran Reese purchased his truck on March 26, 1946, with three cashier's checks purchased by petitioner and endorsed to Reese (R. 6); and, that thereafter, on July 1, 1947, titles to each of the three trucks were transferred to the petitioner (R. 4, 5 & 7).

The petitioner answered the Government's complaint with pleas of limitations and repeal of the Act of 1944 without a saving clause and a denial in general to the complaint (R. 8).

Trial was had before Hon. Wm. H. Atwell (R. 1).

The government first put on two investigators, Girlinghouse and Thomason, and attempted to prove the entire case as stated in the complaint. All of the transactions involved took place in 1946 and 1947, but the government investigators did not make their investigation until 1949 (R. 15, 16, 34), and they testified in 1955, the date of the trial, from recollection because the original records of the veterans' applications had been destroyed. The government introduced two of the three veterans involved: Reese and Adair. Reese testified that he had had no negotiations with petitioner concerning purchasing a truck until he went to the window to pay for the truck when Daniel, the petitioner, gave him three checks, and that he never at any time mentioned to petitioner that he had made

application for a priority and at the time he applied for the priority, he did not know the petitioner (R. 41, 42). Adair testified that the petitioner did not attend the auction when he, Adair, purchased his truck and that petitioner did not know that he had a priority certificate (R. 69, 70) and that he paid for the truck with his own money.

No testimony other than that of the government investigators was introduced in support of the government's complaint as to the Axe transaction and no direct evidence as to any conspiracy, agreement, fraud or device for securing or obtaining the surplus property was introduced by the government—only inferences.

The trial court ordered judgment for the government (R. 13, 74), from which an appeal was duly and timely made to the Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion affirming the trial court (R. 82) with Cameron, Circuit Judge dissenting. Petition for Rehearing was filed by petitioner (R. 109) and denied by the Court of Appeals, with Cameron, Circuit Judge, dissenting (R. 111). Supersedeas bond was filed by petitioner (R. 77). It is to review the judgment of the Court of Appeals affirming the judgment of the trial court that this petition for writ of certiorari is made.

VI. Statement of Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was vested in the court of first instance by Section 26(c) of the Surplus Property Act of 1944, as amended [now 40 U. S. C. 489(c)].

VII. Reasons for Granting the Writ

The petitioner was entitled to a trial conducted in accordance with the provisions of law and equity, that is, he was entitled to require that the complainant prove its case by recognized standards of proof. Any judgment against him without such proof would necessarily result in his loss of private property—in this instance $6,000.00—without due process of law as provided in the Constitution of the United States.

It is important to understand that this was an action wherein the essential ingredient is the charge of fraud, and the law sets up a different standard with respect to the quality of proof required in such cases from that which governs in the normal civil case. By the judgment in this case as it now stands, the government has inflicted upon one of its citizens a severe fine and has branded him as a fraud and a cheat.

The allegations of the complaint were not sustained under any recognized standard of proof and the findings of the trial court would have therefore had to have been based upon hearsay, speculation, suspicion and conjecture.

The evidence produced by the government by the two investigators could have only been hearsay — even with leading questions by government counsel. Neither of the investigators had any personal knowledge whatsoever about any of the things covered by their testimony as their testimony was based only upon recollection and what their reports showed—which were based upon information secured from parties not in this cause of action. Petitioner ob-

jected to this testimony, but the objection was overruled by the trial court with the admonition that petitioner's counsel could cross-examine the witness (R. 20, 21). The testimony of the two investigators had no probative value and the trial court had no right to act upon it.

An examination of the testimony of the two veterans, Reese and Adair certainly sheds no light upon any act of conspiracy or fraud. The veteran Axe was not produced as a witness for the government and no reason was shown as to why he was not produced.

There was no competent evidence connecting petitioner with the Axe transaction that on April 9, 1946, a check was given by him to Axe for some $1,139.00 and no evidence was shown as to what this check covered or related to. Certainly, this was no evidence to tend to connect the petitioner with any conspiracy with Axe.

The veteran Reese, introduced by the government, did not by any stretch of the imagination support any of the contentions of the government in connection with fraud or conspiracy between himself and the petitioner. To the contrary, Reese's testimony, which was uncontradicted, completely nullified any act of conspiracy or fraud.

The bank accounts and checks introduced by the government could not have been proper proof of any conspiracy or fraud under the standard of proof necessary to sustain the government's complaint.

The only means by which the trial court could have reached the conclusion that Daniel conspired with Reese

and Adair to induce them to apply for priority certificates in order that he might buy their trucks, was to decide that the only competent evidence introduced was false. Reese and Adair were the only two witnesses who testified from personal knowledge and they both swore positively that they had no conversation with Daniel and that Daniel did not know that they had applied for or obtained certificates.

The government could not turn its back on Reese as he was a government witness and therefore the government vouched for him. The testimony of Adair was perfectly reasonable — after two unsuccessful trips to purchase a truck he found and bought one which he became dissatisfied with and took it to a place where he understood trucks were being purchased and sold it.

Petitioner, therefore, urges that the government has not made out a prima facie case against him by any fair standard of proof.

Although the trial court did not mention that it indulged in any presumption of guilt by reason of the fact that petitioner did not take the stand in his own behalf, the Court of Appeals sought to use such fact in support of its opinion and judgment affirming the trial court's judgment. In support of petitioners application to this Court, petitioner quotes from the dissenting opinion of the Court of Appeals:

"* * *.

> "Finally, the majority would affirm the lower Court because the defendant did not take the stand to testify. Certainly the Court below did not mention in its find-

ings that it indulged any presumption arising therefrom; and this Court ought not to prop up those findings by, itself, raising the presumption. But even if it were proper so to raise it, the presumption has no validity here. Corpus Juris Secundum classifies the principle upon which the majority relies as a psuedo presumption and discusses its effect in some detail, stating: '*Necessity for a prima facie case.* Where the party on whom the burden of proof was has failed to make out a prima facie case, the absence of the adverse party, or his failure to testify, raises no unfavorable inference against him.' In Stagner v. United States, 5 Cir., 1952, 197 F. 2d 992, 994, this Court called attention to the limitations of the rule in these words: 'This is not to say that (defendant's) silence would supply a complete failure of proof.'

"In no event could this psuedo presumption be held to take the place of evidence where that already introduced does not completely make out a case. This is made plain by Professor Wigmore: 'The appellant whose case is a denial of the other party's affirmation has no *burden of persuading the jury.* A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden. * * *. Even after the proponent has made out a prima facie case, the failure of the opponent to testify to matters particularly within his knowledge does not constitute affirmative evidence of any fact. Any unfavorable inference drawn against the opponent under such circumstances "is persuasive rather than probative".'

> "If the presumption invoked by the majority has any place here it would yield to the presumption indulged by the law that all men are honest and fair. That presumption may be overcome only by clear, explicit and decisive proof. This record contains no competent proof. It contains no competent proof at all to sustain the Government's contentions. * * *." (R. 103-104.)

The government having failed to sustain its contentions alleged in its complaint either by competent proof or by inference, any judgment entered on the evidence adduced in this case could only be directly violative of the Constitutional prohibition against taking private property without due process of law.

Petitioner therefore concludes that the judgment in this cause, if allowed to stand, and execution is issued requiring him to pay said judgment, that he would be deprived of his property without due process of law and without competent proof of his guilt, if any.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said circuit court had in the case numbered and entitled on its docket No. 15,758, C. A. Daniel, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment of

the trial court and the circuit court be reversed by the court, and for such further relief as to this court may seem proper.

Dated November 21, 1956.

Neil Brans

NEIL BRANS,
830 Mercantile Bank Building,
Dallas 1, Texas.
Attorney for Petitioner,

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,758

C. A. DANIEL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(May 25, 1956.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is taken from an aggregate district court award to appellee of $6,000.00, which sum represents treble the statutory recovery of $2,000.00 for each of three fraudulent acts found to have been committed by appellant for the purpose of obtaining certain surplus property of the United States to which

he was not entitled, in violation of the Surplus Property Act of 1944, as amended. The statute upon which appellee's recovery was based reads as follows:

> "(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in, or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, * * *
>
> "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit * * *." Title 40 U. S. C. A., §489(b)(1), formerly Title 50, App., U. S. C. A., §1635(b).

The testimony reveals that, during 1946, appellant and three veterans, George Reese, William Adair and Albert Axe, all worked for the County of Dallas, Texas; that in the Spring of that year each veteran filed an application with the War Assets Administration office at Fort Worth, Texas, wherein each represented that he wished to purchase a Government surplus truck for use in his own business, rather than for resale;[1] that, upon the basis of

[1]Like the Trial Court, we attach little significance to the proven fact that the originals of these veterans' applications for priority certificates had been destroyed prior to the trial and pursuant to an Act of Congress authorizing destruction of such Government records, especially in view of testimony by Government agent, Girlinghouse, that the veteran's representation that his proposed purchase of surplus property *for his own use* "normally is in the application." The veteran, Reese, in fact admitted in his testimony that he represented in his application his

such individual representations by the aforenamed veterans, they were issued verterans' priority certificates enabling them to make priority purchases of such equipment; that veteran Reese used his certificate to purchase a two and one-half ton GMC Cargo Truck for $1,185.00 from the War Assets Administration at a sale held in March, 1946, at Camp Livingston, Louisiana, to which sale he was accompanied by appellant and for which purpose appellant provided the money at the sale site; that Reese never intended to buy this truck for his own use, as evidenced by the fact that he immediately delivered possession of said vehicle and subsequently transferred title thereto to appellant.

It was further shown that veteran Adair, by virtue of his having been issued a priority certificate based upon his representation of the need of such vehicle for his own use, became the purchaser of the same type vehicle for the sum of $1,049.00 at a War Assets Administration sale held at Camp Swift, Texas, on May 8, 1946; that on the following day, May 9, 1946, appellant gave Adair a check in this same amount to cover his

---

intention to use the surplus truck in his own business, and the inclusion of such representation by all three veterans in their applications for the priority certificates is not seriously disputed here. Viewed most favorably to appellant, this is merely a deficiency affecting the cogency of the Government's proof, and one which obviously could not be seriously urged in bar of this action. Further, even in a criminal case, as this Court recently said in Watson v. United States, 224 F. 2d 910, 912,

> "The use of secondary evidence will * * * be justified * * * if it be shown by competent evidence that the Government or its agents had destroyed the original and primary evidence in its possession without any fraudulent purpose or any intent to create an excuse for its nonproduction. Riggs v. Tayloe, 9 Wheat (U. S.) 483, 487; 20 Am. Jur., Evidence, Sec. 438; 4 Wigmore on Evidence, 3rd ed., Sec. 1198."

purchase, whereupon Adair immediately delivered possession of the truck to appellant and subsequently conveyed title to him without ever having used the truck for any purpose of his own, as theretofore represented in his application for a priority certificate to authorize his purchase.

Similarly, the proof reveals that veteran Axe, by virtue of his veterans' priority certificate issued in reliance upon his aforesaid representation was allowed to purchase the same type vehicle at a sale held at Camp Livingston, Louisiana, on March 28, 1946, for the sum of $1,139.00; that Axe also never used his truck for his own purposes, but on May 9, 1946, was paid $1,139.00 by appellant therefor and delivered the vehicle to him, subsequently transferring title to him also.

The district court, sitting without a jury, stated its credibility findings and conclusion therefrom in its unreported oral opinion as follows:

> "The fact that witnesses testified that the defendant Daniel furnished the money and was working with each of the witnesses, and put up the money to purchase, and in one instance, at least, went with the purchaser when he did purchase, and each of these purchasers were veterans entitled to purchase government property at a lower scale than anyone else could purchase it; under that state of facts I believe that the defendant Daniel knew that these veterans were going to get these certificates and to use them in the purchase of this property. It is almost an insult to one's ability to connect testimony and to discover

where the truth lies to make any other conclusion. He put up the money. He got the things that were purchased. He knew they were veterans. And, as I have already said, in at least one instance went with him down there where the sales were made to the veterans.

* * * * *

"I, therefore, conclude, as a matter of law that judgment must go for the plaintiff."

Appellant's sole insistence is that the above quoted findings and inferences of the court are clearly erroneous, and palpably insufficient to support its judgment on the basis of the charge actually plead.[2] He contends, in effect, that since the record is admittedly devoid of any *direct* testimony showing his complicity in any conspiracy with these veterans to make misrepresentations in their applications for such priority certificates, *the court was not authorized to infer his involvement as a matter of law from the case made.* As supporting this insistence, appellant relies upon partial deficiencies in the proof resulting from the Government's failure or inability to show he supplied the money prior to or at the time of purchase for any veteran other than Reese, and upon other testimony tending to negative his participation in any conspiracy with these veterans *at the time their applications were made*, such as Reese's assertion that he did not then know appellant, Adair's testimony that he never told appellant about making any

[2]The complaint alleged that appellant "used, or engaged in, or caused to be used, or engaged in, or entered into an agreement, combination, or conspiracy to use or engage in a fraudulent trick, scheme or device for the purpose of securing or obtaining surplus property consisting of three GMC 1942 model trucks from the United States."

application or receiving his priority certificate, and the further absence of any direct proof as to his knowledge of an application for priority ever having been made by Axe, the veteran who did not testify at the trial.

The obvious answer to this evidentiary argument, as we understand it, is that the trial court was not bound to accept this testimony, nor to attach credence to Adair's apparent attempt to exonerate appellant,[3] but was justified in its ultimate conclusion of liability in view of the contrary proof as to appellant's employment relationship and association with the veterans at the time of their applications and the priority purchases, his fairly inferable knowledge of their eligibility as veterans for such priority vehicle purchases at prices substantially less than those for such trucks as may otherwise have then been available;[4] his almost immediate acquisition of title thereto before each vehicle had ever been used by the veteran for any purpose of his own; his act in either furnishing the money for the purchase, as in the Reese transaction, or reimbursing the veteran in the exact amount of his purchase immediately upon delivery of the vehicle shortly thereafter, as in the Adair purchase; and finally, the inference that appellant

[3]Adair testified that he bought the truck with his own money in appellant's absence; that because the truck broke down with him on the way home, he felt he had been "gypped," and sold it to appellant just to get rid of it. As heretofore noted, however, appellant reimbursed Adair the very next day after his purchase for the exact cost of the truck, and before Adair had ever used the truck for any business purpose of his own.

[4]This Court judicially knows that a shortage of trucks for civilian use existed in 1946 shortly after the end of World War II.

either furnished the money for the Axe purchase,[5] or that at least it was never actually contemplated that Axe would make the personal use of it represented in his prior application, as evidenced by his immediate delivery of possession and subsequent transfer of title to the truck to appellant before he could use it for any purpose of his own. In view of all this testimony and inferences reasonably flowing therefrom, certainly we may not set aside the district court's findings as "clearly erroneous." Rule 52(a), F. R. C. P. Furthermore, from our careful review of the entire record testimony, we can conscientiously claim no "definite and firm conviction that a mistake has been committed" which would justify reversal. See *United States v. United States Gypsum Co.*, 333 U. S. 364, 395.

This is not a criminal proceeding, but a statutory, civil action for liquidated damages, and the Government was not required to prove any conspiracy between appellant and the veterans to file any false applications for the priority certificates beyond a reasonable doubt, but was only required to adduce either substantial evidence of his involvement in such a conspiracy, or his inducement of the misrepresentation as a "fraudulent trick, scheme or device" to enable him to procure surplus vehicles on a

[5]There was no positive showing that appellant furnished the money for the Axe truck purchase, but it was shown that Axe purchased $4,000.00 worth of cashier's checks from a bank just before his purchase, at a time when his bank balance was not nearly so large, and appellant's balance in that same bank was well in excess of that amount. The Government insists that Axe used three of these cashier's checks, each in the amount of $500.00, to pay for his truck.

priority basis to which he was not then entitled under the Act. Acknowledging our duty under the rule to view the testimony and inferences therefrom in the light most favorable to the prevailing party below, we think the proof is adequate to support the award under either theory. See *United States v. Rex Trailer Co.*, 7th Cir., 218 F. 2d 880, aff'd 350 U. S. 148; cf. *Russell v. United States*, 5th Cir., 222 F. 2d 197. Certainly, the proof was sufficient to make out a prima facie case of appellant's involvement in each of the transactions and liability to respond civilly in liquidated damages under the statute; and this not being a criminal case, his failure either to take the stand, or show that he was unable to testify, or even to offer any excuse whatever for his failure to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge, fairly warrants the inference that his testimony, if produced, would have been adverse.[6] As appropriately stated by this Court in *Anderson v. United States*, 185 F. 2d 343, a civil condemnation proceeding in which the claimant of an automobile forfeited for having been used in violation of the internal revenue laws also failed to take the stand:

> "The pertinent and controlling evidence was within his knowledge and it was within his power to explain the circumstances connected with the transaction, yet he declined to testify. 'His silence may well count

[6]See Local 167 v. United States, 291 U. S. 293, 298; 31 C. J. S., Evidence, §156d, p. 860; 20 Am. Jur., Evidence, §190, p. 193; Vol. II Wigmore on Evidence (3rd ed.), §289, p. 171; see also, Meier v. Commissioner, 8th Cir., 199 F. 2d 392, 396, and authorities there cited.

against him, as against any other civil litigant.' Kent v. United States (5th Cir., 157 F. 2d 1, 2)."[7]

Again, the testimony of the two investigators, Girlinghouse and Thomason, to the extent that it was not objected to as hearsay, constituted evidence in the cause. As said by the Supreme Court in *Diaz v. United States*, 223 U. S. 442, 450: "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."[8]

That the Government had a legitimate, proprietary interest in insuring the disposal of its surplus vehicles only to veterans on a priority basis, in accord with the announced policy and objectives of the Surplus Property Act;[9] that appellant was chargeable with knowledge of that declared policy and the prohibition against sale or transfer of a veteran's rights to non-veterans under guise of a fraudulent scheme or agency;[10] and that the Government has suffered compensable damage under the statute for appellant's having obtained such vehicles in manifest perversion

[7]"Constitutional protections against the drawing of adverse presumptions from failure to testify [apply] only to criminal cases. * * *. It is utterly irrelevant to a civil proceeding such as the present one." Attorney General v. Pelletier, 134 N. E. 407, 423; 240 Mass. 264.

[8]See also, Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 130; Rowland v. St. Louis & S. F. R.R. Co., 244 U. S. 106, 108; Schlemmer v. Buffalo, Rochester and Pittsburgh Ry. Co., 205 U. S. 1, 9; and the authorities collected in footnote 14 of the opinion of Judge Learned Hand in United States v. Costello, 2nd Cir., 221 F. 2d 668, 678, affirmed March 5, 1956, 24 L. W. 4128.

[9]For a clear declaration of the Congressional policy and purpose in enactment of the Surplus Property Act of 1944, see Title 50 U. S. C. A. App. (1944 Ed.), §§1611(f), (h), and (q); and Id., §1625.

[10]See, e.g., United States v. Comstock Extension Mining Co., 9th Cir., 214 F. 2d 400, 402.

of that declared policy, are all propositions which, we think, have been settled beyond our duty of further review. As the Supreme Court has most recently held in its construction of this same statute in the Rex Trailer Co. case, *supra:*

> "It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." 350 U. S. 148.[11]

The judgment is

AFFIRMED.

CAMERON, Circuit Judge, DISSENTING:

In my opinion, the allegations of the complaint were not sustained under any recognized standard of proof and the insufficient findings of the Court below were necessarily based upon hearsay, speculation, suspicion and conjecture.

It is important to understand that this is an action whose essential ingredient is the charge of fraud, and that the law sets up a different standard with respect to the quality of the proof required in such cases from that which governs in the normal civil suit. The evidence here falls short of establishing a case under any standard, but it is essential to start out with a recognition of the fact that the law presumes against fraud and in favor of honest and

[11]This Circuit had previously so construed the statute in United States v. Weaver, 207 F. 2d 796, 798, wherein it held "There can be no doubt that the property rights of the United States were injured as a result of the acts alleged in the complaint (charging similar violations)."

fair dealing. Some of the adjectives used in describing the quality of proof required are collected in 37 C. J. S., Fraud, Sec. 114, pp. 427, et seq.:

> "However, the courts have frequently stated that fraud must be established by evidence that is clear and convincing, expressing this principle in various ways, as by saying that fraud must be clearly, distinctly, and fully proved, or that a charge of fraud must be established by evidence that is clear, clear and positive, clear and satisfactory, clear and satisfactory to a reasonable certainty, clear, satisfactory and convincing, clear, cogent, and convincing, clear, cogent and reliable, clear, cogent, convincing, positive and satisfactory, clear, precise, and indubitable * * * positive and definite * * * exceptionally strong * * *."

The Supreme Court went so far in one case as to suggest proof beyond a reasonable doubt.[1] This Court has uniformly applied the general rule above stated, using, in *United States v. City of Brookhaven*, 1943, 134 F. 2d 442, the words "clear and decisive proof," and saying, in *Saenz, et al v. Kenedy, et al*, 1949, 178 F. 2d 417, 419: "Fraud is never presumed and must always be proven by clear and convincing evidence."

Most conspiracy cases are criminal, but it is well to remind ourselves also that courts are disposed to require proof of a convincing nature in conspiracy cases. See e.g. *Copeland v. United States*, 5 Cir., 1937, 90 F. 2d 78; *Rent et al v. United States*, 5 Cir., 1954, 209 F. 2d 893. According to American Jurisprudence, Vol. 11, Conspiracy, Sec. 56, p. 585, the same rules of evidence are applicable in civil as in criminal cases. Under these authorities the circum-

[1]Mr. Justice Storey in Prevost v. Gratz, 6 Wheat. 481, 498.

stances relied upon to establish the conspiracy must be strong enonugh to be inconsistent with every reasonable hypothesis of innocence.

We begin an analysis of the Government's evidence by accepting a statement from the majority opinion:

> "* * * the Government was not required to prove any conspiracy between appellant and the veterans to file any false applications for the priority certificates beyond a reasonable doubt, but was only required to adduce either substantial evidence of *his involvement in such a conspiracy, or his inducement of the misrepresentation* as a 'fraudulent trick, scheme or device' to enable him to procure surplus vehicles on a priority basis to which he was not then entitled under the Act."[2]

Daniel was accused of inducing three veterans, William B. Adair, Albert R. Axe, and George L. Reese, to make these false affidavits[3] in order that he might get the benefit of them. The Government produced Reese as a witness, the defendant produced Adair, and there was no substantial competent proof concerning Axe.

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[2]Emphasis here and elsewhere supplied unless otherwise noted. Of course, under the tests of proof quoted above, mere substantial evidence was not sufficient.

[3]I do not belabor the point that the sworn applications were not produced, though it is clear that secondary evidence was not admissible. The witness by whom the proof was attempted knew only that 1,248 cubic feet of records of this general character were destroyed. He would not essay to testify that these particular records were not still in existence. Presumably this litigation did not, after nine years, spring full-fledged from somebody's imagination as Pallas did from the head of Jove. It would seem logical that, during that extended period of incubation, the evidence would have been nursed carefully and not destroyed.

Congress did not command that the records be destroyed. It only gave permission for their destruction if they were not needed. It is not difficult to visualize that a private litigant, essaying to proceed under like circumstances, would be met with the rule of law, "Where it appears that a party seeking to establish a fact has voluntarily destroyed a writing constituting or containing the best evidence of that fact, he cannot

The Government first put on two investigators, Girlinghouse and Thomason, and essayed by them to prove the entire case as stated in the complaint. All of these transactions had taken place in 1946, and these investigators did not make their investigation until 1949, and they testified in 1955, but they were permitted to tell as facts everything they had turned up in their investigation. The type of examination used to establish the Government's case may be illustrated by questions asked Mr. Girlinghouse concerning the veteran, Axe.[4] Now, Mr. Girlinghouse

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introduce secondary evidence thereof, especially where the suit is in his own behalf and is founded on the writing, *without first introducing evidence to explain his destruction of the writing and to repel all inference of fraudulent design arising therefrom.*" 32 C. J. S., Evidence, 824, p. 752, and cf. *Consolidated Coke Co. v. Commissioner*, 3 Cir., 1934, 70 F. 2d 446, 448.

[4]"Q. Now, did you investigate the sale of surplus property to Mr. Albert R. Axe, consisting of a truck?
"A. Yes, sir.
"Q. Did you examine his application?
"A. Yes, sir. * * *
"Q. Did this application to be issued a veteran's priority certificate contain a statement as to why he wanted it?
"A. It stated the truck was to be used in his own personal business and not for resale.
"Q. As a result of having been issued this priority certificate was he issued the priority certificate and was he the successful purchaser of a 2½ ton GMC Cargo Truck by the War Surplus Administration sale held at Camp Livingston, Louisiana, March 28, 1946?
"A. Yes.
"Q. Did he pay $1,139.00 to the government for this truck?
"A. Yes.
"Q. Did you examine the document to see how he paid for this truck?
"A. Yes, sir. * * *
"Q. Now, did Mr. Axe keep this truck himself and use it in his business as he represented?
"A. No, sir, he didn't.
"Q. What did he do with it?
"A. He turned the truck over to Mr. Daniel.
"Q. Did Mr. Daniel pay him anything for the truck?
"A. Yes, sir.
"Q. How much?
"A. $1,139.00. * * *
"Q. And Mr. Axe never used the truck for himself?
"A. That is correct."

had no personal knowledge whatever about any of the things he covered in his testimony. He was testifying from his recollection or what his report showed, and it was based entirely on information he got from Axe and from other people.[5]

These investigators were interrogated at great length in this same manner, with an abundance of leading questions, covering each of the transactions of the three veterans. It strains credulity that the Government would seek to introduce any such palpably incompetent evidence or that the Court would take up its time receiving it (more than twenty pages in the record). At all events, the evidence had no probative value and the Court below had no right to act upon it.

With respect to the Axe transaction there was no competent evidence connecting appellant with it except that, on April 9, 1946, a check was given by him to Axe for $1,139.00.[6] The check did not show what it covered or related to. The Government also showed that the State National Bank of Garland, Texas issued six cashier's

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[5]Appellant objected to one question similar to those set out above and the objection was overruled, and later he interposed that the witness was not testifying to what he knew of his own personal knowledge, and the Court countered that the attorney could cross-examine the witness. Apparently appellant's attorney interpreted this remark and the Court's action to mean that the Court would eliminate all of the incompetent evidence and decide the case only on the competent evidence as he made no further objection. Such an interpretation would comport with procedures normally followed in hearings without a jury.

[6]We are treating the checks and bank records as if they had been properly proven though sufficient proof was not made as to any of them to make them admissible in evidence if objection had been made.

checks to Axe dated March 12, 1946, four for $500 each and two for $1,000 each. They were purchased with currency, the source of which is not hinted at. The bank statemen of Daniel covering several months about that time failed to show any withdrawals which might have gone to Axe in any such amount.

The Government introduced Veteran Reese, who testified that he did make application to the Government for a priority and on the certificate issued he did purchase at Camp Livingston, Louisiana, a GMC Cargo Truck, paying therefor $1,185.00. He paid for the truck by using three $500 cashier checks made out to Daniel and endorsed by him. He had no negotiations with Daniel until they went to the window to pay for the truck, and Daniel then gave him the three checks and Daniel took the change. He had never had any conversation with Daniel before that time and had not mentioned to Daniel that he had made application for priority. At the time he applied for priority he did not know Daniel. Reese worked for Dallas County under Buck Frank, and Daniel also worked for Dallas County.

Reese drove the truck back to Garland and left it at the county shops and about a year later he transferred title to Daniel. He had driven to the sale in a car belonging to J. B. Carney and along with Danel, Adair and Axe, all being employees of the county except possibly Axe. The county bought one truck. Reese had had conversation with Mr. Carney before the purchase, but had never had a con-

versation with Daniel. The truck remained on the county's lot where he left it for two or three months, and was there when he moved away.

The fartherest reach of this proof is that, without prior negotiations, Daniel paid for this truck after it was purchased at the auction, the truck was delivered to the county lot and remained idle for several months, and a year or so later Daniel applied to Reese for transfer. Even if resort to speculation should be had, and the conclusion should be reached that Carney must have told Daniel that Reese had a priority certificate and asked Daniel to finance the purchase, such a premise would lend no support to the conclusion that Daniel, whom Reese did not know, had induced Reese to obtain this certificate by filing a false affidavit.

Adair testified that he was, at the time, employed by Dallas County. He made an application for priority for the purchase of a truck—"I wanted to haul some gravel and make some money with a truck like the biggest part of the people were trying to do." He went to three auctions before he was able to buy one, and Daniel, representing the county, went to one of these. Adair bought a truck at Camp Swift at Austin about May 8, 1946. Daniel was not with him and did not know whether he was at the auction, and Daniel did not know that he had a certificate of preference or had ever applied for one. He paid for the truck with his own money, giving his check dated May 8, 1946, for $1,049.00. On that date he had a balance in the State Na-

tional Bank of Garland of $3,447.53. He drove it home, and made this statement with regard to it:

> "Well, in coming home with it it come to pieces and it was bigger and heavier than I wanted and I felt like I had been gypped and I had spent all the money I had for this particular truck and I decided I was going to get out from under it if I could."

Upon learning that Daniel might be interested in purchasing it, he went to see Daniel and sold it to him the following day for the amount he had paid for it. Daniel did not contribute to his expenses, did not know he was buying a truck, and they had never had any conversation about such a matter. He knew Daniel, but was not sure whether Daniel was then working for the county or not.

The only way by which the Court below could have reached the conclusion that Daniel conspired with Reese and Adair to induce them to apply for preference certificates in order that he might buy their trucks, was to decide that the only competent evidence introduced was false. The only two witnesses who testified on the subject were Reese and Adair and they both swore positively that they had had no conversation with Daniel and that Daniel did not know that they had applied for or obtained certificates. Certainly there was no evidence at all tending to connect Daniel with any such conspiracy with respect to Axe.

But it is not permissible that the trier of the facts reject such uncontradicted and unimpeached testimony. Certainly the Government cannot turn its back on what Reese said

because it had placed him on the stand and vouched for him. The story Adair told was entirely reasonable. He had made two unsuccessful trips to purchase a truck; he made the purchase out of his own funds which he had in the bank without having any prior conversation at all with Daniel; he was displeased with his purchase and went to the county lot where he understood trucks were being purchased and promptly made the sale. There is nothing unreasonable or incredible at all about that statement.

We rejected the right of a trial court arbitrarily to ignore such testimony in the recent case of *Benton v. Blair*, 1956, 228 F. 2d 55, 58, et seq. We there reviewed the cases generally and concluded that the trial court was not at liberty to disregard such testimony "* * * in the absence of conflicting proof or of circumstances justifying countervailing inferences * * *." We arrived at a like conclusion in *Foran v. Commissioner*, 1948, 165 F. 2d 705, and in *Smith v. Dunn*, 1955, 224 F. 2d 353.

The Supreme Court has furnished good guidance in such matters in *Pennsylvania R. R. Co. v. Chamberlain*, 1933, 288 U. S. 333, 339-40:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover * * *.
>
> "There being several inferences deducible from the facts which appear, and equally consistent with all

> those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover * * *. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."

At most, we have here proof that Daniel put up the money to buy Reese's car without having had any dealings concerning that car until after it had been bid in. He gave a check to Axe and even if it be speculated that he bought the Axe truck the day after its purchase (if, in truth, one had been purchased) with no explanation concerning the facts or circumstances of the purchase, such a course proves nothing wrong or suspicious. He bought the Adair truck the day after its purchase and with a plausible and uncontradicted explanation showing that purchase to have been in complete good faith. That is all of the competent proof.

And let it be understod that, if the Gvernment labored under a crippling decrepitude, as we are asked to infer, it was entirely self-imposed. It had the option to sue all of those charged with having entered into the conspiracy, and examine each of them as a witness with full right of rejection and impeachment of their testimony. Rule 43(b) F. R. C. P. If it had a case, it elected to prosecute it on crutches because it chose to make "flesh of one and fowl of another."

The majority opinion frankly bases the affirmance on two crutches without which it is clear that the judgment

would not be permitted to stand: [the first crutch is that the majority assume that the Court below accepted and acted upon the hearsay evidence furnished by the two investigators;] and the second crutch is that the majority assumes that [the Court below was led to its decision in part, at least, by the presumption the majority conceives to be attendant upon failure of the defendant to take the stand.] Neither proposition is, in my opinion, sound under the facts of this case.

To begin with, the hearsay evidence was objected to once, the objection was overruled and, under established procedures, it was not necessary to continue to make objections. But we pass that by because it is clear beyond argument that this Court will presume that the trial Court did not consider the incompetent evidence. The general rule is thus stated in 5 Corpus Juris Secundum, Appeal and Error, Section 1564(e), pp. 404 et seq.:

> "*It will be presumed, in the absence of a showing to the contrary, that all proper evidence was considered and all improper evidence disregarded by the trial court in making its findings.*
>
> * * * * *
>
> "In general it will be presumed on appeal, where the case is tried by the court without a jury, that the court considered only proper and competent evidence in making its findings * * * and it will be presumed that such [incompetent] evidence was disregarded, this rule having been applied, among other instances, to evidence of extrajudicial statements, privileged communications, parol evidence varying a writing, opinions, hearsay, carbon copies, or the legal conclusions of the pleader * * *."

This Court recognizes that rule. See *Riley v. Doing*, 5 Cir., 1949, 176 F. 2d 449, 453-4: "We will not undertake to segregate and separately discuss the ruling of the Court on the evidence, but will assume that he based his findings of fact on only the evidence that was competent." And the Supreme Court said very much the same thing when,[7] commenting on the failure of a party to follow up certain evidence with proof necessary to give it effect, it stated: "If so, the testimony was harmless. In other words, if the testimony was not followed up by other testimony which was necessary to give it effect we may assume that the Court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the Court."[8]

The majority opinion clearly attributes to the purely hearsay evidence full probative status, citing *Diaz v. United States*, 223 U. S. 442, 450. That was a criminal case tried before a jury and the evidence under consideration was proffered by the defendant and was admitted without objection. The opinion of Judge Hand in *United States v. Costello*, 221 F. 2d 668, 678, is also relied upon. That was a case where a motion was being heard to quash an indictment because it was based upon hearsay evidence. Certainly that has no application here. It is plain that

[7]J. J. McCaskill Co. v. United States, 1910, 216 U. S. 504, 517.

[8]In State Tax. Comm. v. United etc. Co., the Supreme Court of Arizona, 1931, 6 P. 2d 889, used this language in referring to hearsay evidence not objected to in the lower Court: "It is, however, the undoubted rule of law that, when a case is tried to the court, even though incompetent evidence be admitted without objection, the trial court may disregard, and will be presumed to have disregarded, such evidence in rendering its decision, * * *."

Costello had nobody present before the grand jury to object, and the entire reason behind the rejection of hearsay evidence, opportunity to cross-examine, was lacking. The other cited cases are similarly inapplicable.

Finally, the majority would affirm the lower Court because the defendant did not take the stand to testify. Certainly the Court below did not mention in its findings that it indulged any presumption arising therefrom; and this Court ought not to prop up those findings by, itself, raising the presumption. But even if it were proper so to raise it, the presumption has no validity here. Corpus Juris Secundum[9] classifies the principle upon which the majority relies as a psuedo presumption and discusses its effect in some detail, stating:[10] "*Necessity for prima facie case.* Where the party on whom the burden of proof was has failed to make out a prima facie case, the absence of the adverse party, or his failure to testify, raises no unfavorable inference against him." In *Stagner v. United States*, 5 Cir., 1952, 197 F. 2d 992, 994, this Court called attention to the limiations of the rule in these words: "This is not to say that [defendant's] silence would supply a complete failure of proof."

In no event could this psuedo presumption be held to take the place of evidence where that already introduced does not competently make out a case. This is made plain

[9]31 C. J. S., Evidence, Sec. 118.
[10]Ib. Sec. 156(d), p. 862.

by Professor Wigmore:[11] "The appellant whose case is a denial of the other party's affirmation has no *burden of persuading the jury.* A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legtimate burden. * * * Even after the proponent has made out a prima facie case, the failure of the opponent to testify to matters particularly within his knowledge does not constitute affirmative evidence of any fact. Any unfavorable inference drawn against the opponent under such circumstances 'is persuasive rather than probative'."

If the presumption invoked by the majority has any place here it would yield to the presumption indulged by the law that all men are honest and fair.[12] *That presumption may be overcome only by clear, explicit and decisive proof.* This record contains no such proof. It contains no competent proof at all to sustain the Government's contentions. The Government has inflicted on one of its citizens a severe fine, whatever nice language may be used in the endeavor to make

[11]2 Wigmore, Par. 290, p. 179, supplemented by statement added to the text by 1955 pocket supplement, p. 57.

[12]Provost v. Gratz, *supra.*

it seem less offensive, and has branded him as a fraud and a cheat. I am unwilling to do this on so flimsy a showing. Therefore, I dissent.

A True Copy:
Teste:

.....
Clerk of the United States Court
of Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of May 25th, 1956

No. 15,758

C. A. DANIEL,

v.

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Cameron, Circuit Judge, dissenting."

* * * * *

ORDER DENYING REHEARING

Extract from the Minutes of August 27, 1956

No. 15,758

C. A. DANIEL,

v.

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Cameron, Circuit Judge, dissenting."

* * * * *

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

JOHN A. FEEHAN, JR.
Clerk

New Orleans 6, La.
August 27, 1956

Mr. W. F. Bane
Attorney at law
Dallas, Texas

Dear Sir:

I beg to advise you that the Court today entered an order denying the Petition for the Rehearing in re—

No. 15758, C. A. DANIEL vs. UNITED STATES OF AMERICA,

Cameron, Circuit Judge, dissenting.

No opinion was rendered in connection therewith.

Very truly yours,

John A. Feehan, Jr.,
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 594

C. A. DANIEL, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court for the Northern District of Texas (R. 74-75) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 13-36) is reported at 234 F. 2d 102.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1956 (Pet. App. 37). A petition for re-

hearing (R. 107), timely filed, was denied on August 27, 1956 (Pet. App. 39). The petition for a writ of certiorari was filed on November 23, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court's findings of fact, in this civil action to recover liquidated damages, are "clearly erroneous" under Rule 52(a), F.R.C.P.

STATUTE INVOLVED

Section 26(b) of the War Surplus Act of 1944, 58 Stat. 780, 50 U.S.C. App. (1946 ed.) 1635(b), provides in pertinent part:

> Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2000 for each such act * * *.

STATEMENT

This is a civil suit brought by the Government to recover from petitioner an aggregate sum of $6000, consisting of $2000 liquidated damages for each of

three separate violations of the Surplus Property Act of 1944 (*supra*, p. 2).[1]

Sitting without a jury, the District Court found that the Government sustained the burden of proving the allegation of its complaint that petitioner "used, or engaged in, or caused to be used, or engaged in, or entered into an agreement, combination, or conspiracy to use or engage in a fraudulent trick, scheme or device for the purpose of securing or obtaining surplus property consisting of three GMC 1942 Model Trucks from the United States" (Pet. App. 17).

The testimony reveals that in 1946 three veterans, George Reese, William Adair, and Albert Axe, filed applications with the War Assets Administration office at Fort Worth, Texas, in order to secure veteran priority certificates enabling them to make priority purchases of war surplus materiel. Each application represented that the veteran wished to purchase a Government surplus truck for use in his own business and not for resale (Pet. App. 14). On the basis of these representations, the three veterans were issued the priority certificates which they used to purchase three GMC 1942 Model Trucks (Pet. App. 14-15).

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[1] This Act was repealed by the Act of June 30, 1949, 63 Stat. 399, and was reenacted as the Act of June 30, 1949, 63 Stat. 392, 40 U.S.C. 489. The present action was brought under the original 1944 statute. 1 U.S.C. 109 provides that, absent an express provision in the repealing act for the release or extinguishment of any penalty, forfeiture, or liability, such repealed act shall be treated as remaining in force as to any penalty, forfeiture, or liability incurred prior to the repeal. The repealing Act of June 30, 1949, 63 Stat. 399, contained no releasing provision. See *United States* v. *Weaver*, 107 F. Supp. 963 (N.D. Ala.).

At the time of the issuance of these veterans' priority certificates and the purchase of the trucks, all three veterans were employed by the County of Dallas, Texas, as was petitioner (Pet. App. 14; R. 41). Petitioner was the superior of at least one of these veterans (R. 72).

Veteran Reese used his certificate to purchase a 2½ Ton GMC Cargo Truck for $1185.00 from the War Assets Administration at a sale held in March, 1946, at Camp Livingston, Louisiana. Petitioner accompanied Reese to the sale, where Reese paid for the truck with three cashier's checks, each in the amount of $500.00 and each drawn in favor of petitioner, who had endorsed them to Reese (R. 21). Reese turned the truck over to petitioner immediately after the sale, and Reese never used the vehicle for his own purposes (R. 22-23). The following testimony by Reese indicates the relationship that existed between petitioner and Reese (R. 41):

> A. I bought [the truck] for [petitioner] with the intention of driving it and working for him.
>
> Q. But you were not going to own the truck, were you?
>
> A. No, sir.

The evidence concerning the relationship between petitioner and the other two veterans discloses a repetition of the pattern involved in the Reese purchase. Adair purchased a truck of the same type for $1,049.00 at a War Assets Administration sale held at Camp Swift, Texas on May 8, 1946 (Pet. App. 15). On the following day, May 9, 1946, petitioner gave his check

in the amount of the purchase price to Adair, who thereupon immediately delivered possession of the truck to petitioner without ever having used the truck for any purpose of his own (Pet. App. 15-16).[2]

Similarly, veteran Axe purchased a truck of the same type on March 28, 1946, paying for it with three cashier's checks drawn in the amount of $500.00 each (Pet. App. 16; R. 28). Axe purchased these checks from the State National Bank of Garland, Texas, with cash (R. 67). No withdrawal was made from his bank account at that time (R. 68). Possession of the truck was transferred to petitioner immediately upon the sale, and Axe never used the truck for his own purposes (R. 29). On May 9, 1946, Axe received from petitioner his check in the amount of the purchase price of the truck (Pet. App. 16).

On the basis of this testimony, the District Court entered judgment for the United States in the amount of $6,000, consisting of $2,000 for each of the three violations. The judgment was affirmed by the Court of Appeals for the Fifth Circuit, one judge dissenting.

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[2] Adair, testifying for the defense, stated that it was not until after his purchase, when he was driving the truck home, that he decided to sell the truck because, as he put it, "it was bigger and heavier than I wanted and I felt like I had been gypped" (R. 71). According to his testimony, he then learned that petitioner would buy it from him and the sale was consummated (R. 71).

ARGUMENT

1. The gravamen of the petition for certiorari is that "The government has not made out a prima facie case" (Pet. 9). Whether the Government introduced evidence sufficient to support a judgment in its favor was carefully considered by the trial judge, who stated (Pet. App. 16-17) in his unreported oral opinion:

> It is almost an insult to one's ability to connect testimony and to discover where the truth lies to make any other conclusion [than that embodied in its judgment].

And, in affirming the trial judge's decision, the Court of Appeals majority concluded (Pet. App. 19):

> * * * certainly we may not set aside the district court's findings as "clearly erroneous". Rule 52(a), F.R.C.P. Furthermore, from our careful review of the entire record testimony, we can conscientiously claim no "definite and firm conviction that a mistake has been committed" which would justify reversal. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395.

After this thorough and painstaking consideration, petitioner asks this Court to review again a question as to the weight and sufficiency of the evidence. He attempts to garnish his petition by phrasing the question in constitutional terms (Pet. 2-3).[3] But the

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[3] The constitutional issue is raised for the first time here. The Court of Appeals stated: "Appellant's sole insistence is that the above quoted findings and inferences of the court are clearly erroneous, and palpably insufficient to support its judgment on the basis of the charge actually plead." (Pet. App. 17)

question nevertheless remains one of the weight and sufficiency of the evidence. No question of general significance is presented, and further review is not merited.[4]

The evidence clearly shows that the Government sustained its burden of proof. See the Statement, *supra,* pp. 3-5. Three veterans working in the same office with petitioner each purchased a truck with a veteran's priority certificate, representing that the truck was to be used in his own business and was not being purchased for resale; immediately after the purchase, each veteran transferred possession of his truck to petitioner; one veteran, accompanied to the sale by petitioner, paid for the truck with cashier's checks drawn in favor of petitioner and endorsed to the veteran; the other two received petitioner's personal check for the amount of the purchase price. One veteran testified that he was not to own the truck he was purchasing. Clearly this evidence, both circumstantial and direct, was enough in this civil action to establish a prima facie case entitling the trier of fact to render a verdict in favor of the plaintiff, and the burden of producing evidence to explain these suspicious facts and circumstances peculiarly within his knowledge was henceforth on petitioner.

2. Weaving through the petition is the contention that the District Court should have applied the

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[4] "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178. See also *Southern Power Co.* v. *N.C. Public Service Co.*, 263 U.S. 508; *United States* v. *Johnston*, 268 U.S. 220, 227.

standard of proof required in criminal cases — *i.e.*, proof "beyond a reasonable doubt" (Pet. 3, 7, 9). Such a standard, which goes to the degree to which the trier of fact must be persuaded (see IX *Wigmore on Evidence* (3rd ed.) § 2494), could not have helped petitioner. There can be no doubt of the trial court's certainty in its decision. As already pointed out, the District Judge stated from the bench that "It is almost an insult to one's ability to connect testimony and to discover where the truth lies to make any other conclusion" (Pet. App. 16-17).

Moreover, it is well settled that the standard of proof which petitioner would require is not applicable here. This Court has only recently emphasized that the remedy under the present statute is one for liquidated damages and is civil in nature. *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 151. See also *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537; *Helvering* v. *Mitchell,* 303 U.S. 391. In *United States* v. *Regan,* 232 U.S. 37, this Court held that the criminal standard of proof was not to be applied even in a suit to recover a penalty. This conclusion applies *a fortiori* with respect to a civil action for liquidated damages.

3. Finally, petitioner (Pet. 3, 9-11) suggests that the decision below presents the question "[w]hether [petitioner's] failure to take the stand in his own behalf after the Government had failed to make out a prima facie case would warrant the inference that if his testimony had been produced, it would have been adverse to his interests." But this question, by its own terms, is based on the assumption that "the Gov-

ernment had failed to make out a prima facie case." As already pointed out (*supra,* pp. 7-8), such an assumption cannot be made. The court below initially found (Pet. App. 20) that "[c]ertainly, the proof was sufficient to make out a prima facie case". Only then did the court state (*ibid.*): "and this not being a criminal case, his failure either to take the stand, or show that he was unable to testify, or even to offer any excuse whatever for his failure to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge, fairly warrants the inference that his testimony, if produced, would have been adverse." The propriety of such an inference in a civil case was established by this Court in *Local 167* v. *United States,* 291 U.S. 293, 298, on which the court below relied (Pet. App. 20). See also *Kirby* v. *Tallmadge,* 160 U.S. 379. The same rule is followed by a majority of state courts. II *Wigmore on Evidence* (3d ed.) § 289.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.

George Cochran Doub,
Assistant Attorney General.

Samuel D. Slade,
Hershel Shanks,
Attorneys.

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